COMMONWEALTH BANK OF AUSTRALIA *a*

v.

THOMAS QUADE & ORS.

HIGH COURT, AUSTRALIA
MASON CJ *b*
DEANE J
DAWSON J
TOOHEY J
GAUDRON J
[F.C. 91/032]
3 OCTOBER 1991 *c*

CIVIL PROCEDURE: *Summons for directions - Administration of justice - Reconciliation of the (a) "demands of justice" and (b) the "policy" that there be an end to litigation at least prima facie - Grounds for new trial - General rule - Primary test - General rule distinguished from cases where the trial itself has miscarried "through misdirection, misreception of evidence, wrongful rejection of evidence or other error or to a case of surprise, malpractice or fraud - Such cases cannot properly be seen as mere cases of "fresh evidence" - Pre-trial procedure - Failure to comply with pre-trial discovery order - A considerable number of relevant documents in the possession of the defendant - That should have been discovered at the material period of trial at first instance - Was not discovered.* *d*

Summons for Directions:

i) Forum of Appeal (High Court) - issues raised - question of law as to the appropriate "test" to be applied on an application for a new trial - where the successful party admits that it has failed to give proper discovery. *e*

ii) Petition - jointly made by parties - parties agreeing prior to the Hearing of Appeal - that the matter be listed for mention. Parties to make further submissions as to the future conduct of proceedings on the basis of reasons given as per our mention. *f*

This appeal arises from the order of the full Court of the Federal Court. The respondents sustained financial losses by reason of unfavourable exchange rate fluctuations in relation to a swiss franc loan which had been made to them by the appellant, the Commonwealth Bank of Australia. They sued the appellant ("the bank") in the Federal Court of Australia claiming for damages.

The first action was dismissed by Morling J in the Federal Court. The respondents appealed to the Full Court of the Federal Court. The Full Court (Neaves, Burchett and Einfeld JJ) upheld the appeal and ordered that there be a new trial. *g*

The ground and only ground, on which the appeal to the Full Court succeeded was that, subsequent to the verdict at the first instance, the defendant bank has disclosed that, for reasons which remain unexplained, it had failed to comply with the requirements of a pre-trial discovery order in that it had not discovered a considerable number of relevant documents which were in its possession and should have been discovered. *h*

At the instance of the present appeal from the judgment of the full Court, the parties in the cause of their arguments came to understand that, the "issue or question on the type of approach that had to be determined - was actually the question, whether or not the approach adopted by the full Court of the Federal Court - a correct one? *i*

The critical issue that was elaborately considered by the appellate Court is with regards to the determination of rules as grounds for a new trial. As per the matter before the Court in the instant appeal, the general rule identifying the circumstances in which an appellate Court is justified in setting aside a verdict merely on the grounds of fresh evidence as cited in *Orr. v. Holmes* [1948] 76 CLR p. 632, and cited in *Wollongong Corporation v. Cowan* [1955] 93 CLR 433 was restated but distinguished.

Held:

[1] On the issue of whether the verdict should be set aside, should be determined by reference to "broad consideration of justice", including the public interest in finality of litigation and equally important principle that a party should not be permitted to mock the orders of the Court.

[Order Appeal stood over generally. Liberty reserved to either party to restore the matter to the list on seven days (7) days' notice to the other party.]

Cases referred to:

Wollongong Corp v. Cowan [1955] 93 CLR 435 ***(foll)***
McCann v. Parsons [1954] 93 CLR 418 ***(cit)***
Orr v. Holmes [1948] 76 CLR 632 ***(cons)***
McDonald v. McDonald [1965] 113 CLR 529 ***(cons)***
Southern Cross Exploration NL v. Fire & All Risks Insurance Co. Ltd. 2 NSWLR 340 ***(dist)***

For the appellant - L.E. Taylor, Chief Solicitor to the Commonwealth Bank
For the respondent - M/s Ferrier & Associates

JUDGMENT

Mason CJ:

The respondents sustained financial losses by the reason of unfavourable exchange rate fluctuations in relation to a Swiss franc loan which had been made to them by the appellant, the commonwealth Bank of Australia. They sued the appellant (the bank) in the Federal Court of Australia claiming damages for:

i) breach of s. 52 of the Trade Practices Act 1974 (Cth)

ii) breach of the Contracts Review Act 1980 (NSW), and

iii) common law negligence. It was common ground that the respondents would succeed on all three causes of action or on none of them.

At the first instance in the Federal Court, the learned trial Judge (Morling J) dismissed the respondents' action. The respondents appealed to the full Court of the Federal Court on a number of grounds. The full Court (Neaves, Burchett and Einfeld JJ) upheld the appeal and ordered that there be a new trial. The ground, and only ground, on which the appeal to the full Court succeeded was that, subsequent to the verdict at first instance, the bank had disclosed that, for reasons which remain unexplained, it had failed to comply with the requirements of a pre-trial discovery order in that it had not discovered a considerable number of relevant documents which were in its possession and should have been discovered. The present appeal is from the judgment of the full Court.

Before the hearing of the appeal the parties notified the Court that they jointly proposed that the Court take the following course in dealing with the appeal:

1. The Court ... only deal (at this stage) with the question of law as to the appropriate 'test' to be applied on an application for a new trial where the successful party admits that it has failed to give proper discovery.

2. When a judgment is delivered on that issue, the matter ... be listed for mention for the purpose of the parties putting submissions as to the future conduct of the proceedings in the light of the reasons given.

At the commencement of argument, the Court indicated that it was, in the circumstances of the case, prepared to adopt the proposed course. Accordingly, we will confine our consideration of the appeal at this stage to the question of what is the appropriate approach (or test) to be adopted by an appellate Court for determining whether a new trial should be ordered when documents which should have been discovered were not discovered by the successful party. It became apparent in the course of argument that that question was understood by both sides as encompassing the question whether the approach actually adopted by the full Court of the Federal Court was a correct one. For ease of reference, we shall use the phrase "the relevant documents" to refer to the documents which should have been but were not discovered.

The general rule identifying the circumstances in which an appellate Court is justified in setting aside a verdict merely on the grounds of fresh evidence was identified by Dixon J in *Orr. v. Holmes* [1948] 76 CLR 632 in a passage which is quoted in the judgment of Burchett J in the present case. Subsequently, in *Wollongong Corp. v. Cowan* [1955] 93 CLR 435, Dixon CJ repeated the substance of those comments in a judgment in which the other members of the Court (Williams, Webb, Kitto and Taylor JJ) concurred. In the latter case his Honour said *ibid*:

> If cases are put as aside where as trial has miscarried through misdirection, misreception of evidence, wrongful rejection of evidence or other error and if cases of surprise, malpractice or fraud are put in one side, it is essential to give effect to the rule that the verdict, regularly obtained, must not be disturbed with-out some insistent demand of justice. The discovery of fresh evidence in such circumstances could rarely, if ever, be a ground for a new trial unless certain well-known conditions are fulfilled. It must be reasonably clear that if the evidence had been available at the first trial and had been adduced, an opposite result would have been produced or, if it is not reasonably clear that it would have been produced, it must have been so highly likely as to make it unreasonable to suppose the contrary. Again, reasonable diligence must have been exercised to procure the evidence which the defeated party failed to adduce at the first trial.

The words "rarely, if ever" in the above passage leave open the possibility of exceptional circumstances justifying a departure from the general rule even in the class of case to which the general rule is directed. It is not, however, necessary to pursue that aspect of the matter for the purposes of the present case. Nor is it necessary to consider whether the somewhat obscure qualification expressed by Dixon CJ in the words "or, if it is not reasonably clear that it would have been produced, it must have been so highly likely as to make it unreasonable to suppose the contrary" represents other than an illusory relaxation of the primary test that is," reasonably clear that ... an opposite result would have been produced").

As the above quotation makes plain, the general rule formulated by Dixon CJ is directed to the ordinary case where all that is involved is that relevant fresh evidence has come to the notice of the unsuccessful party after the trial. It is not directed to the case where the trial itself has miscarried " through misdirection, misreception of evidence, wrongful rejection of evidence or other error" or to a case of "surprise, malpractice or fraud". Such cases cannot properly be seen as mere cases of "fresh evidence". Nor can a case where the material constituting the fresh evidence was unknown to the unsuccessful party by reason of misconduct on the part of the successful party, such as an admitted failure to comply with the requirements of the trial Court's order for discovery of documents. True it is that a case

of failure by a party to comply fully with such an order can be distinguished from one in which the trial has miscarried by reason of error or fault on the part of the tribunal itself or a case where the verdict can be seen to have been procured by fraud or perjury. On the other hand, a case of failure to comply with a discovery order could, particularly where the failure was deliberate or remains unexplained, come within the category of "case of malpractice", and be a stronger case than the category of "cases of surprise", which were both expressly exempted from the above statement of what we have referred to as the "general" rule.

In *McCann v. Parsons* [1954] 93 CLR 418, the case immediately preceding *Wollongong Corp. v. Cowan* in the Commonwealth Law Reports, Dixon CJ, Fullagar, Kitto and Taylor JJ pointed out *ibid* that the various grounds upon which an appellate Court proceeds in granting the remedy of a new trial "have been settled by practice but ... have never become completely stereotyped; they have always possessed some flexibility and have been governed by the overriding purpose and reconciling the demands of justice with the policy in the public interest of bringing suits to a final end". In cases where all that is involved is the discovery by the unsuccessful party of fresh evidence, *Orr. v. Holmes* and *Wollongong Corp. v. Cowan* establish that the reconciliation of "the demands of justice" and the "policy" that there be an end to litigation at least *prima facie* (or generally" (see *McDonald v. McDonald* [1965] 113 CLR 529) dictate that the successful party should be deprived of the verdict in his favour only if the unsuccessful party persuades the appellate Court that there was no lack of reasonable diligence on his part and that it is reasonably clear that the fresh evidence would have produced an opposite verdict. Such a stringent rule in that ordinary class of case is supported by considerations of both justice and public interest. Considerations of justice support it in that it would be unfair to the successful party if he were to be deprived of a verdict obtained after a trial on the merits and be subjected to the expense, inconvenience and uncertainty of a further trial merely because some relevant evidence had, without fault on his part, been unavailable to the unsuccessful party at the time of trial. Considerations of public interest support it in that it is desirable in the public interest that there be finality in litigation in other than the truly exceptional case. If all that was necessary to procure the setting aside of a regularly obtained verdict was that the unsuccessful party show that fresh evidence which might have affected the outcome of the trial has become available after the trial, the verdicts of the Courts would be of a provisional character only, being subject to the discovery of further relevant evidence.

The position is, however, different in a case such as the present where the unavailability of the evidence at the trial resulted from a significant failure by the successful party to comply with an order for the discovery of relevant documents in his possession or under his control. The application to that category of case of the general rule that a new trial should only be ordered on the ground of fresh evidence if it is "almost certain" (see *Orr v. Holmes [1948]* 76 CLR) or "reasonably clear" (see *Wollongong Corp. v. Cowan* [1955] 93 CLR) that the opposite result would have been produced if the evidence had been available at the first trial would, particularly where the failure was deliberate or remains unexplained, serve neither the demands of justice in the individual case nor the public interest in the administration of justice generally. In so far as the demands of justice in the individual case are concerned, it would cast upon the innocent party an unfairly onerous burden of demonstrating to virtual certainty what would have happened in the hypothetical situation which would have existed but for the other party's misconduct. In so far as the public interest in the administration of justice generally is concerned, it would be likely to ensure to the successful party the spoils of his own default and thereby encourage, rather than to penalize, failure to comply with pre-trial orders and procedural requirements.

It is neither practicable nor desirable to seek to enunciate a general rule which can be mechanically applied by an appellate Court to determine whether a new trial should be ordered in a case where misconduct on the part of the successful party has had the result that relevant evidence in his possession has remained undisclosed until after the verdict. The most that can be said is that the answer to that question in such a case must depend upon the appellate Court's assessment of what will best serve the interests of justice, "either particularly in relation to the parties or generally in relation to the administration of justice" (of eg. *McDonald v. McDonald* [1965] 113 CLR). In determining whether the matter should be tried afresh, it will be necessary for the appellate Court to take account of a variety of possibly competing factors, including, in addition to general considerations relating to the administration of justice, the degree of culpability of the successful party of. *Southern Cross Exploration NL v. Fire & All Risks Insurance Co. Ltd. [1985]* 2 NSWLR 340 any lack of diligence on the part of the unsuccessful party and the extent of any likelihood that the result would have been different if the order had been complied with and the non-disclosed material had been made available. While it is not necessary the appellate Court be persuaded in such a case that it is "almost certain" or "reasonably clear" that an opposite result would have been produced, the question whether the verdict should be set aside will almost inevitably be answered in the negative if it does not appear that there is at least a real possibility that would have been so.

The leading judgment in the full Court of the Federal Court on this aspect of the present case was delivered by Burchett J. His Honour recognized that the general rule explained by Dixon CJ in *Orr v. Holmes* and *Wollongong Corp v. Cowan* sets too stringent a standard for a case such as the present where, in Burchett J's words, the successfully party "has seriously failed in the performance of its own obligation, and has thereby created the ... difficulty". His examination of the relevant documents led him to conclude that the result "might" have been different if the bank had not failed to produce them to the respondents on discovery. In these circumstances, his Honour considered that the question whether the verdict should be set aside should be determined by reference to "broad considerations of justice" including the public interest in finality of litigation and the "equally important principle that a party should not be permitted to mock the orders of the Court". It should be apparent from what has been said above that approach adopted by Burchett J was correct. Neaves J was in general agreement with the judgment of Burchett J on this aspect of the case. While Einfeld J did not expressly deal with the approach to be adopted in determining whether a new trial should be ordered, we read his Honour's comments as indicating that he also was in general agreement with what was said by Burchett J in that regard.

In accordance with the agreement of the parties, the Court is not concerned, at least at this stage, to embark upon an examination of the evidence for the purpose of reviewing the actual decision of the full Court that there be a new trial. That being so, the only order that should be made now is that the appeal should be stood over generally with liberty reserved to either party to restore the matter to the list on seven (7) days' notice to the other party. The respondents have indicated that if, as is the case, the Court is of the view that the full Court of Federal Court did not fall into error in identifying the appropriate test, they wish to submit that an order should be made revoking the grant of special leave to appeal. If the parties are unable to reach agreement about the further orders which should be made in the light of what has been said in this judgment, the convenient course would seem to deal with that submission on the material which is at present before the Court.

Also found at [1992] 1 CLJ 339